In the Supreme Court

OF THE

United States

OCTOBER TERM, 1955

No. 504

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation,
Petitioner,

vs.

AUDRA H. PALMER,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

OPINION BELOW

The opinion of the Court of Appeals is reported in the Federal Reporter system at 225 Fed.(2d) 876.

II

JURISDICTION

The judgment of the Court of Appeals was filed and entered March 24, 1955. (See Appendix B, Petition for Writ of Cer-

tiorari.) A petition for rehearing was denied September 23, 1955. (Tr. 357, 358). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A., 1254(1).

III

QUESTIONS PRESENTED FOR REVIEW

Is an appeal taken from an order of the court denying a motion for new trial and a motion to amend findings, an appeal from a final decision under United States Code, Title 28, Sec. 1291?

Is the jurisdiction of the Court of Appeals to be determined from the intention existing in the mind of the drafter of a notice of appeal where the notice states that the appeal is from the order denying a motion for new trial?

Can a statute which has been repealed by Congress (28 *United States Code*, Sec. 777, repealed June 25, 1948, 62 Stat. 992, c.646, Sec. 39), or *United States Code*, Title 28, Sec. 2111, or the *Federal Rules of Civil Procedure* be relied upon to invoke the jurisdiction of the Court of Appeals?

IV

STATUTES AND RULES INVOLVED

United States Code, Title 28, Sec. 1291, Final Decision of District Courts:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * *"

United States Code, Title 28, Sec. 2106, Determination:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court *lawfully brought before it for review*, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or re-

quire such further proceedings to be had as may be just under the circumstances."*

United States Code, Title 28, Sec. 2111, Harmless Error:

> "*On the hearing* of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

United States Code, Title 28, Sec. 2072, Rules of Civil Procedure for District Courts:

> "The Supreme Court shall have the *power to prescribe,* by general rules, the forms of process, writs, pleadings, and motions, and *the practice and procedure of the district courts of the United States* and of the District Court for the territory of Alaska in civil actions. * * *"

Order of Supreme Court of United States dated June 3, 1935, appointing Advisory Committee to formulate Federal Rules of Civil Procedure:

> "It is ordered:
>
> 1. Pursuant to Section 2 of the Act of June 19, 1934, c.651, 48 Stat. 1064 (28 U.S.C.A. §723c) the Court will undertake the preparation of a unified system of general rules for cases in equity and actions at law *in the District Courts of the United States* and in the Supreme Court of the District of Columbia, so as to secure one form of civil action and procedure for both classes of cases, while maintaining inviolate the right of trial by jury in accordance with the Seventh Amendment of the Constitution of the United States and without altering substantive rights."

Federal Rules of Civil Procedure, Rule 1. Scope of Rules:

> "These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy,

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*Wherever emphasis appears in a statute, rule, or quotation from an opinion in this brief, the emphasis was supplied by the writer of the brief.

and inexpensive determination of every action. As amended, 1949.

V

STATEMENT OF FACTS

July 6, 1954, judgment was entered (Tr. 42) for the Respondent, Audra H. Palmer, and against the Petitioner, State Farm Mutual Automobile Insurance Company, in the sum of $10,000.00 together with interest and costs.

July 15, 1954, Petitioner filed a motion for new trial and a motion to amend findings (Tr. 43-46).

August 24, 1954, the Court made its order denying defendant's motion for new trial and to amend findings in the following language (Tr. 46):

> "ORDER Defendant's motions for new trial and to amend findings are denied."

September 17, 1954, Petitioner filed the following notice of appeal with the Clerk of the District Court. (Tr. 48-49):

"NOTICE OF APPEAL

> "Notice Is Hereby Given that State Farm Mutual Automobile Insurance Company, a corporation, Defendant in the above-entitled and numbered cause, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the *order* entered in the above-entitled and numbered cause on August 24, 1954, in favor of Plaintiff, Audra H. Palmer, and against the Defendant, State Farm Mutual Automobile Insurance Company, insofar as said order of August 24, 1954, denies Defendant's motions for new trial and denies Defendant's motions to amend findings and grants judgment to Plaintiff and against the Defendant in the sum of Ten Thousand Dollars ($10,000.00), together with interest thereon at the rate of six per cent (6%) per annum from January 18, 1951, and together with Plaintiff's costs incurred therein."

Respondent filed a motion to dismiss the appeal in the Court of Appeals for want of jurisdiction in that Appellant had not filed notice of appeal from the final decision of the District Court.

March 24, 1955, The judgment of the Court of Appeals dismissing the appeal was filed and entered (See Appendix B, Petition for Writ of Certiorari.) (Tr. 357)

September 23, 1955, Petition for Re-hearing was denied. (Tr. 358)

VI

REASONS FOR DENYING WRIT

(a) The decision of the Court of Appeals does not conflict with the decision of this Court in *United States vs. Ellicott,* 223 U.S. 524, 56 L.Ed. 535.

(b) The decision of the Court of Appeals does not conflict with the decision of the Courts of Appeals for the Fifth Circuit, the Seventh Circuit and the District of Columbia as claimed in Petitioner's brief.

(c) The decision of the Court of Appeals is not and cannot be controlled by the Federal Rules of Civil Procedure, including Rule 61, for the reason that such Rules govern only the procedure in District Courts. They do not apply to Appellate Courts or enlarge the statutory jurisdiction of Appellate Courts. Nor is the decision of the Court of Appeals contrary to *United States Code,* Title 28, Sec. 2111, or the decisions of this Court in *Hoiness vs. United States,* 335 U.S. 297, 93 L.Ed. 16, and *United States vs. Arizona,* 346 U.S. 907, 98 L.Ed. 405.

(d) There is no need for this Court to exercise its power of supervision in the instant case for the record plainly shows that Petitioner failed to appeal from the final judgment in the case; and Petitioner so acknowledged before the Court of Appeals, as appears from the opinion of that Court. 225 Fed. (2d) 876, 877.

VII

ARGUMENT

I

Jurisdiction of Court of Appeals is statutory; and such Court may review only judgments, decrees or orders of a Court lawfully brought before it for review by notice of appeal from a final decision or order from which an appeal may be taken. Petitioner gave notice of appeal from the order of the District Court denying a motion for new trial, which is not an appealable order.

With the exception of the situations expressly provided for by *United States Code,* Title 28, Sec. 1292, the Court of Appeals has jurisdiction to review only *"final"* decisions of the District Court *"lawfully brought before it for review."*

United States Code, Title 28, Secs. 1291, 2106.

Cobbledick vs. United States, 60 S.Ct. 540, 309 U.S. 323, 84 L.Ed. 783, 785.

Cohen vs. Beneficial Industrial Loan Corp., 69 S. Ct. 1221, 337 U.S. 541, 93 L.Ed. 1528, 1536.

An order of the District Court denying a motion for new trial and to amend findings is not a final decision. The Court of Appeals is without jurisdiction to review the decision of the District Court in the absence of an appeal from the judgment.

In Re McIntosh (C.C.A. 9), 95 Fed. (2d) 627

Armstrong vs. New LaPaz Gold Mining Co., (C.C.A. 9), 107 Fed. (2d) 453, 454

United States vs. Tavares Const. Co. (C.A. 9), 175 Fed. (2d) 379, 380

Agostino vs. Ellamar Packing Co., Inc. (C.A. 9), 191 Fed. (2d) 576, 577

Libby, McNeill & Libby vs. Alaska Industrial Board (C.A. 9), 215 Fed. (2d) 781, 782

Bass vs. Baltimore & O. Terminal R. Co. (C.C.A. 7), 142 Fed. (2d) 779, 780

Ford Motor Co. vs. Busam Motor Sales, Inc., (C.A. 7), 185 Fed. (2d) 531, 533

Luckenbach S. S. Co. vs. United States, 47 S.Ct. 186, 272 U.S. 533, 71 L.Ed. 394, 395.

The only decision of the District Court appealed from herein is the order of August 24, 1954, which denied the motion for new trial and to amend findings. Clearly that is not an appealable order under the authorities above cited.

In *Luckenbach S. S. Co. vs. United States*, supra, 71 L.Ed. 394, 395, where a situation almost identical with the one here presented was involved, this Court held:

> "The judgment was entered April 28, 1924. The claimant seasonably moved for a new trial and included in the motion a request for amended findings. While that motion was pending the claimant, becoming apprehensive lest the time allowed for an appeal might be running, filed with the clerk an application for an appeal from the judgment. Thereafter the motion for a new trial, with the request for amended findings, was denied, and the application for an appeal was then brought to the court's attention and allowed. A little later the claimant applied for an appeal from the order refusing a new trial and amended findings and the court allowed that appeal.
>
> "Counsel for the United States insist that neither appeal was effective. Plainly the second was not, for it was from an order which was not appealable. But the first was from the judgment and we think it was well taken."

Under similar circumstances in *Libby, McNeill & Libby vs. Alaska Industrial Board*, supra, 215 Fed. (2d) 781, 782, the Court held:

> "Appellant erroneously assumes that this 'minute order' denying its motion for a new trial is appealable as a 'final decision' under Section 1291 of Title 28, U.S. Code. An order denying a motion for a new trial is not the kind of 'final decision' contemplated by the statute. (Citing Cases). The doctrine thus adopted is only an exemplification of the statutory limitation that jurisdiction does not attach unless ap-

peal is taken from a 'final decision.' Most other courts follow a like rule. In many other situations this court has enforced the jurisdictional requirement that appeal is to be taken from a 'final decision' with meticulous and technical exactness. (Citing Cases).

"The final decision in the instant action from which an appeal to this court might have been taken under Section 1291, supra, was the decree of January 2, 1953. No appeal from that decree was taken, hence this court is without jurisdiction of the purported appeal now before us. It must be, and, hereby is, dismissed."

The only final decision of the District Court in this case from which an appeal might have been taken was the judgment entered in July 6, 1954. No appeal from that judgment was taken; therefore the Court of Appeals for the Ninth Circuit was without jurisdiction of the purported appeal and properly dismissed the appeal.

II

Notice of appeal from an order denying a motion for new trial and to amend findings, which order is correctly identified by the date thereof in the notice, is not an appeal taken from a final decision. The decisions of this Court, the Fifth and Seventh Courts of Appeals and the Court of Appeals for the District of Columbia are not in conflict with the decision of the Court below.

Respondent will consider each of the cases cited by Petitioner in Part I of its Argument and demonstrate that the cases do not support Petitioner's argument.

In *United States vs. Ellicott*, 223 U.S. 524, 56 L.Ed. 535, 543, final judgment was entered against the United States on May 18, 1908. A motion for new trial was denied January 4, 1909. On February 25, 1909 the United States gave notice of appeal "from the *judgment* rendered in the above-entitled cause on the 4th day of January, 1909." The appeal was taken from the *judgment* entered in the case. The notice of appeal mistakenly referred to the

date on which the motion for new trial was denied rather than the date on which the judgment was entered. This Court properly held that it would disregard the mistaken date.

Petitioner also cites the case of *Wilson vs. Southern Ry. Co.* (C.C.A. 5), 147 Fed.(2d) 165, in which judgment was entered April 27, 1944. Motion for new trial was denied June 10, 1944. Notice of appeal was filed "from the final *judgment* entered in this action on June 10, 1944." Motion to dismiss the appeal was denied, the Court holding that an appeal was taken from the final judgment notwithstanding the date upon which the judgment was entered was mistakenly designated in the notice of appeal.

In *Atlantic Coast Line R. Co., vs. Mims* (C.C.A. 5), 199 Fed. (2d) 582, defendant gave notice of appeal "from the *judgment* overruling its motion for new trial." Motion to dismiss the appeal was denied on the ground that there was an appeal from the judgment although the judgment appealed from was misnamed.

In *Wetherbee vs. Elgin, etc. Co.* (C.C.A. 7), 204 Fed.(2d) 755, judgment was entered in January, 1952. The motion for new trial was denied March 21, 1952. Appellant gave notice of appeal "from the *judgment* entered in this action" on March 21, 1952. The Court ruled, as in the other cases, supra, that the mistake as to the date of the entry of the judgment appealed from was immaterial.

The same ruling was made by the U. S. Court of Appeals for the District of Columbia in the case of *Safeway Stores vs. Coe*, 136 Fed.(2d) 771, in which the notice of appeal recited that Appellant "hereby appeals * * * from the *judgment* of this Court entered the 17th day of January, 1942 * * *" which was the date on which the order denying a motion for re-hearing was made.

In *U. S. vs. Ellicott, Wilson vs. Southern Ry. Co., Wetherbee vs. Elgin, etc. Co.* and *Safeway Stores vs. Coe*, supra, the Appellant gave notice of appeal from the *judgment* in the action which was the final decision. In each of these cases the notice of appeal incorrectly specified the date on which the judgment was entered,

giving by mistake the date on which a non-appealable order was entered. In *Atlantic Coast Line R. Co. vs. Mims,* supra, there was no mistake as to date, but the appeal was from the *judgment* — not, as here, from the *order* denying the motion for a new trial. The only principle which can be drawn from these cases is that where the notice of appeal designates that the appeal is from the *judgment* the Court will consider as immaterial and disregard mistakes in specifying the date on which the *judgment* was entered. Accordingly, the cases cited by Appellant do not support its argument at page 13 of its Petition For Writ of Certiorari where it incorrectly draws the following conclusion from said cases:

> "In the discussion just set forth, we have shown that this Court as well as the Courts of Appeal of the Fifth and Seventh Circuits and of the District of Columbia hold that *a notice of appeal which refers only to the date on which a motion for new trial was denied* is sufficient to invoke the appellate jurisdiction of the court."

If Petitioner's conclusion is valid, then indeed the Courts by judicial interpretation have amended *United States Code,* Title 28, Secs. 1291 and 2106. Under no circumstances can a notice of appeal "which refers only to the date on which a motion for new trial was denied" be construed as notice of appeal from a final judgment. Petitioner has not cited a single case which supports its conclusion.

The decision in *Sobel vs. Diatz,* 189 Fed(2d) 26, is not pertinent. That case was tried in the Municipal Court of the District of Columbia and was taken first on appeal to the Municipal Court of Appeals and from that court to the United States Court of Appeals for the District of Columbia. The latter Court accepted the decision of the Municipal Court of Appeals, treating the notice as an appeal from the judgment. The only reliable case disclosing the position of the Court of Appeals for the District of Columbia is the case of *Safeway Stores vs. Coe,* supra, in which that Court disregarded a mistake in the date of entry of judgment.

III

There is neither a mistake in date nor mere defect in form in Petitioner's Notice of Appeal.

At the time of the oral argument on Respondent's motion to dismiss the appeal in the Court below, Petitioner acknowledged that it had not taken an appeal from the final judgment. It moved the Court to allow an amendment of its notice of appeal (See Appendix, this brief; Tr. 361, 362), and argued the matters referred to in the opinion of the Court of Appeals, 225 Fed(2d) 876, 877, as follows:

> "The appellee has moved to dismiss the appeal because it was not taken from a final judgment.
>
> "Appellant acquiesces in this statement but urges (1) that an intention to review the judgment on the merits can be ascertained from the notice, (2) that the notice was filed within time to perfect an appeal from the judgment, (3) that a motion was filed to amend the notice of appeal long after the time for filing thereof had lapsed, and (4) that, by the points and specifications of errors placed in the record after time of filing the notice had expired, sufficient definiteness was attained."

Having been unsuccessful in that approach in the Court of Appeals Petitioner now changes its position and in this Court talks about "mistakes in dates" in its notice of appeal (Petition For Writ of Certiorari, Page 15) and of only a defect in form in its Notice of Appeal. A casual examination of the notice of appeal filed by Petitioner discloses that there was no mistake in dates and no defect in form in its notice which specified that Appellant

> "* * * hereby appeals to the United States Court of Appeals for the Ninth Circuit from the *order* entered in the above-entitled and numbered cause on August 24, 1954, in favor of Plaintiff, Audra H. Palmer, and against the Defendant, State Farm Mutual Automobile Insurance Company, insofar as said order of August 24, 1954, denies Defendant's motions for new trial and denies Defendant's motions to

amend findings and grants judgment to Plaintiff and against the Defendant in the sum of Ten Thousand Dollars ($10,000.00), together with interest thereon at the rate of six per cent (6%) per annum from January 18, 1951, and together with Plaintiff's costs incurred therein."

The fact that the Notice twice specifies the order of August 24, 1954 can leave no doubt but that it was the only order appealed from. The description of that order as denying Defendant's motion for new trial and denying Defendant's motion to amend findings definitely and unmistakenly ties it to the order of August 24. It is apparent that the drafter of the notice misconstrued the legal effect of that order as granting judgment. The order of August 24 did not grant judgment. But the date specified in the notice of appeal was *not a mistake.* It correctly identifies the only order appealed from.

IV

Neither the enlightened policy expressed in the Federal Rules of Civil Procedure, nor repealed Sec. 777 of former Title 28, *United States Code,* as carried forward in present Sec. 2111 of the Judicial Code, can confer jurisdiction on Court of Appeals or amend the jurisdictional requisites of Secs. 1291 and 2106 of the Judicial Code or be invoked to supply jurisdictional defects.

At Page 15 of its brief Petitioner argues that the enlightened policy expressed in the *Federal Rules of Civil Procedure* (Rule 61) and the Judicial Code (*United States Code,* Title 28, Sec. 2111) constitutes ground for disregarding the fact that Petitioner did not give notice of appeal from the judgment and for construing its notice as being sufficient to invoke the appellate jurisdiction of the Court below. In this argument it claims that repealed Sec. 777 of former Title 28, *United States Code,* has been carried forward and embodied in Rule 61 of the *Federal Rules of Civil Procedure* and Sec. 2111, *United States Code,* Title 28.

This Court has recognized that the *Federal Rules of Civil Procedure* apply only to United States District Courts. *Mookini et al vs. U. S.,* 303 U. S. 201, 82 L.Ed. 748.

This Court also has recognized that the authority to establish the *Federal Rules of Civil Procedure* did not authorize this Court to increase or enlarge the jurisdiction of Federal Courts. In *United States vs. Sherwood,* 312 U. S. 584, 85 L.Ed. 1058, 1063, this Court said:

> "* * * An authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction and the Act of June 19, 1934, 48 Stat. at L. 1064, chap. 651, 28 U.S.C.A., § 723b, authorizing this Court to prescribe rules of procedure in civil actions gave it no authority to modify, abridge or enlarge the substantive rights of litigants or to enlarge or diminish the jurisdiction of federal courts."

Accordingly, the *Federal Rules of Civil Procedure* do not affect the jurisdiction of or deal with the powers of appellate courts. These rules do not apply to Courts of Appeal.

> *Federal Rules of Civil Procedure,* Rule 1;
>
> *Audi Vision Inc., vs. R.C.A. Mfg. Co., Inc.,* 136 Fed. (2d) 621;
>
> 1 *Federal Practice and Procedure,* Barron and Holtzhoff, 1955 Pocket Part, Sec. 121, p. 106;
>
> *Board of Governors of Federal Reserve System vs. Trans-America Corp.,* (C.A. 9), 184 Fed.(2d) 311, 317.

The Rules have worked no modification of the provisions of the Judicial Code that Courts of Appeal have appellate jurisdiction to review only final decisions of District Courts. *Leonard vs. Socony-Vacuum Oil Co.,* 130 Fed(2d) 535.

The Court below did not overlook the fact (as contended by Petitioner at page 16 of its Petition) that repealed Sec. 777 of the former Judicial Code may have been embodied, inpart, in Rule 61 of the *Federal Rules of Civil Procedure.* See opinion

of the Court of Appeals, 225 Fed(2d) 876, 877, in footnote No. 2 in which the Court correctly said:

> "* * * The Rules of Cicil Procedure, 28 U.S.C.A., do not affect this situation. No appeal lies unless taken from a 'final decision'."

Accordingly, even if repealed Sec. 777 of former Title 28, *United States Code,* was carried forward, in part, in Rule 61 of the *Federal Rules of Civil Procedure,* the enlightened policy therein expressed cannot be invoked to add something to Petitioner's notice of appeal which does not exist therein since the *Rules of Civil Procedure* have no application to Courts of Appeal; they do not affect or modify the jurisdictional requirements embodied in Sec. 1291 of the Judicial Code.

Petitioner argues that repealed Sec. 777 of former Title 28, *United States Code,* was carried forward in present Sec. 2111, *United States Code,* Title 28, entitled "Harmless Error" which we have quoted, supra. The present Sec. 2111 can have application only where the Court of Appeals has jurisdiction to hear the case. The Eighth Circuit Court held that repealed Sec. 777 of former Title 28, *United States Code,* could not be employed to supply a lack of jurisdiction.

In Re Griggs, 233 Fed. 243.

United States Code, Title 28, Sec. 1291, is supplemented by Sec. 2106, Title 28, *United States Code,* which provides that the Supreme Court and the courts of appellate jurisdiction may rule upon judgments, decrees or orders of a court "lawfully brought before it for review". Accordingly, Sec. 2111, supra, does not apply to a case unless and until it is determined that the Court of Appeals has jurisdiction of the case. The alleged liberality of doctrine referred to therein cannot be invoked to supply a lack of jurisdiction or to construe a notice of appeal according to an intention in the mind of the drafter. Any effort to invoke Sec. 2111 for this purpose is putting the cart before the horse.

V

The rulings of this Court in the Hoiness case and the Arizona case are not contrary to the ruling of the Court below.

Petitioner cites the case of *Hoiness vs. United States*, 335 U.S. 297, 93 L. Ed. 16, 19. (Petition For Writ of Certiorari, page 15) In that case the trial Court made its first order on August 5, 1946, as follows:

> "It is ordered:
>
> "That the libel herein is dismissed for lack of jurisdiction, and that respondents have judgment for costs.
>
> "Counsel for respondents will submit findings of fact and conclusions of law in accordance with the rules of court and the opinion filed herewith."

Pursuant to the order of August 5, counsel for the Government presented findings of fact and conclusions of law on October 14, 1946, on which date the trial Court signed a decree that it had "no jurisdiction over the subject matter of the action, and that the libel be dismissed."

October 18, 1946, Appellant filed its notice of appeal stating that it was "aggrieved by the * * * *judgment and decree* made and entered herein on October 14, 1946." The Government moved to dismiss on the ground that the order of August 5, 1946 was the final decision and only appealable order.

It is not true, as stated at page 15 in the Petition For Writ of Certiorari, that "the petition for appeal referred solely to the order which was not appealable * * * *". An examination of the record in the *Hoiness* case discloses that the trial Court and all counsel considered the order of October 14, 1946 as the only final decision; otherwise, why did counsel for the Government present findings of fact and conclusions of law on October 14, 1946 and obtain a decree of the Court on said date dismissing the libel if such was not the final decision of the Court?

But the real basis of the decision of this Court in the *Hoiness* case was former *United States Code*, Title 28, Sec. 777, which has since been repealed. (June 25, 1948, 62 Stat. 992 c. 646, § 39.) Whether repealed Sec. 777 was carried forward, in part, in Rule 61 of the *Federal Rules of Civil Procedure* cannot help Petitioner in view of the decisions of this Court, supra: *Mookini et al vs. U.S.; United States vs. Sherwood;* also in view of the decisions of the Courts of Appeal, supra: *Audi Vision Inc. vs. R.C.A. Mfg. Co., Inc.: Board of Governors of Federal Reserve System vs. Trans-America Corp.:* and *Leonard vs. Socony-Vacuum Oil Co.* These decisions all hold that the *Federal Rules of Civil Procedure* (including Rule 61) apply only to the District Courts and that they do not prescribe or affect the appellate powers or the jurisdiction of Courts of Appeal. (See also Rule 1 of *Federal Rules of Civil Procedure* and Order of this Court dated June 3, 1935, supra.)

Petitioner next cites the case of *United States vs. Arizona*, 346 U.S. 907, 98 L. Ed. 405, in which this Court by a memorandum opinion reversed the lower Court. In this case the trial judge made the following order October 6, 1952:

> "IT IS ORDERED that the motion of the Third Party Defendants to dismiss the Third Party Complaint be and it is granted, and it is further ordered that this case be and it is dismissed without prejudice to the Third Party Defendants."

The Court of Appeals dismissed the appeal on motion of the State of Arizona on the ground that the notice of appeal referred only to that portion of the order of October 6, granting the motion to dismiss the third party complaint and not to that portion of the order dismissing the case. No judgment was entered in the case, and it is obvious that this Court treated the order of October 6, 1952 as one entire order, the date of which was correctly specified in the notice of appeal, and ruled correctly that the defect in the notice of appeal referring to that portion of the order dismissing the third party complaint was a mere technicality which should have been disregarded.

In the instant case, there was no failure to correctly describe the order from which the appeal was taken, as in *Shannon vs. Retail Clerks, Int. Protective Ass'n.*, 128 Fed(2d) 553, 555, and *Porter vs. Borden's Dairy Delivery Co.*, 156 Fed(2d) 798. The notice of appeal in this case twice referred to the order appealed from as being made on August 24, 1954, and further described that order as the order denying defendant's motion for new trial and denying defendant's motion to amend findings. Consequently there was no defect of a technical nature which could have been disregarded by the Court of Appeals.

VI

The real issue before this Court is one of jurisdiction of the Court of Appeals and not one of discretion.

Petitioner repeatedly states "No one was misled or injured," and cites *Voehl vs. Indemnity Insurance Co.*, 288 U.S. 162 at 177. (Petition For Writ of Certiorari, page 17). Counsel is in error in this citation. The quotation referred to is actually from the opinion of this Court in *Ohl and Company vs. Smith Iron Works*, 288 U.S. 170, 77 L. Ed. 681, 684. In the Smith Iron Works case this Court pointed out the distinction between the discretion of a Court where a question of practice was involved rather than one of jurisdiction by quoting from a former decision of this Court at page 683 of 77 L. Ed. as follows:

> "* * * thus, in Idaho and O. Land Co. v. Bradbury, 132 U.S. 509, 33 L. Ed. 433, 10 S. Ct. 177, the Clerk of the Court below in attempting to authenticate the record had appended the seal of the Court but had failed to comply with the rule of this Court in affixing his signature. The Court said (page 513): 'The question presented is not one of no authentication, but of irregular or imperfect authentication; *not of jurisdiction, but of practice.* It is therefore within the discretion of this Court to allow the defect to be supplied'."

The question involved in the instant case is not whether the respondent was injured or misled, but whether the jurisdiction of

the Court of Appeals was invoked by taking an appeal from the order denying the motion for a new trial instead of from the final decision of the District Court. In enacting *United States Code*, Title 28, Secs. 1291 and 1292, Congress prescribed that Courts of Appeal shall have jurisdiction to review the final decisions and the interlocutory decisions therein set forth.

United States Code, Title 28, Sec. 2106, further prescribes that this Court and the Court of Appeals may rule only upon judgments, decrees or orders of a Court "lawfully brought before it for review." Congress did not enact a law that the jurisdiction of the Court of Appeals could be invoked by a notice of appeal from an *order* denying a motion for new trial or "which refers only to the date on which a Motion for New Trial was denied" (Petition For Writ of Certiorari, page 13) so long as "no one was misled or injured".

For the reasons above stated the Petition For Writ of Certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent

December 28, 1955

APPENDIX

APPENDIX

In the United States Court of Appeals for the Ninth Circuit

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation, *Appellant,* vs. AUDRA H. PALMER, *Appellee.*	No. 14560 MOTION TO ALLOW AMENDMENT OF NOTICE OF APPEAL

COMES NOW Appellant, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation, and moves this Honorable Court for an order allowing Appellant to amend its Notice of Appeal in accordance with said Amended Notice of Appeal attached hereto. Said Motion is made pursuant to the authority of the Court under Section 28, U.S.C. 1653.

SCOVILLE & LINTON
219 Heard Building
Phoenix, Arizona

By WALTER LINTON
Attorneys for Appellant

In the District Court of the United States for the District of Arizona

AUDRA H. PALMER, *Plaintiff.* vs. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation, *Defendant.*	No. Civ. 1620 Phx. AMENDED NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation, Defendant in the above-entitled and numbered cause, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered by the District Court on the 6th day of July, 1954, granting Plaintiff a judgment against Defendant in the sum of Ten Thousand Dollars ($10,000.00), together with interest thereon at the rate of six per cent (6%) per annum from January 18, 1951 until paid, together with her costs incurred; and that certain order entered by the District Court on August 24, 1954, denying Defendant's Motion for New Trial and denying Defendant's Motion to Amend Findings of Fact and Conclusions of Law.

DATED this 7th day of February, 1955.

SCOVILLE & LINTON
219 Heard Building
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By WALTER LINTON
Attorneys for Defendant